92-1361

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

BILL ARMONTROUT, et al.,
Petitioners,

vs.

MICHAEL BURTON, et al.,
Respondents.

Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

JEREMIAH W. (JAY) NIXON
Attorney General

DON M. DOWNING
Deputy Attorney General

BRUCE FARMER*
MICHAEL E. PRITCHETT
Assistant Attorneys General

Sixth Floor, Broadway Building
Post Office Box 899
Jefferson City, Missouri 65102
(314) 751-3321

Attorneys for Petitioners

**Counsel of Record*

St. Louis Law Printing, Inc. 13307 Manchester Rd. St. Louis, MO 63131 314-231-4477

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QUESTION PRESENTED

Does a federal court have jurisdiction to order injunctive relief when the individual defendants have received a directed verdict or jury verdict in their favor and there has been no finding that any individual defendant has violated the Constitution?

PARTIES TO THE PROCEEDING IN THIS COURT AND THE COURT OF APPEALS

The parties to the proceeding in this Court and the Court of Appeals are as follows:

Appellants
(now petitioners)

Dick Moore
Dora Schriro
George Lombardi
Bill Armontrout
Michael Groose
Loren Stout
Richard Bowers
Dorothy Lauberth
Cindy Haggart
David Corum
William Wieberg
Louis Markway
Ed Hanauer
Larry Neal
Richard Bauman
Carl Borghardt, Jr.
Dennis Gately

Appellees
(now respondents)

Thomas Umphfrey
Ricky VanOster
Michael Burton
Kenneth Charron
Leonard Joe Cooper
John Murrain
Michael Nelson
Freddie Taylor
William Wirth

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PETITION FOR WRIT OF CERTIORARI

The petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered on September 21, 1992.

OPINIONS BELOW

The Opinion of the Court of Appeals for the Eighth Circuit is reported at *Burton v. Armontrout*, 975 F.2d 543 (8th Cir. 1992), and is reprinted in the appendix hereto beginning at page A-3. The Order of the district court is unreported and is reprinted in the appendix beginning at page A-10.

JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. § 1983 and 28 U.S.C. §§ 1331 and 1343, respondents filed suit in the United States District Court for the Western District of Missouri. At a jury trial, each petitioner obtained either a directed verdict or a jury verdict in his or her favor. The district court entered judgments in favor of petitioners pursuant to these verdicts. Thereafter, the district court entered injunctive relief against petitioners. A-10 to A-18.

Following cross-appeals by the parties, the Court of Appeals for the Eighth Circuit entered a judgment and opinion affirming the rulings of the district court. A-3 to A-9. A timely petition for rehearing or rehearing en banc was filed and was denied on October 28, 1992. A-2. Following a timely application for an extension of time within which to file a petition for a writ of certiorari, this Court granted petitioners until February 15, 1992 to file their petition. A-1.

The jurisdiction of this Court to review the judgment of the Court of Appeals is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant constitutional and statutory provisions are:

ARTICLE III

* * *

Section 2. The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made or which shall be made under their authority; . . ..

SEVENTH AMENDMENT

In suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be

preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of common law.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

Respondents (hereinafter referred to as prisoners) are or were incarcerated in the Jefferson City Correctional Center (JCCC), formerly known as the Missouri State Penitentiary. These prisoners worked in the maintenance department and claimed their constitutional rights were violated when they were exposed to waste water generated by inmates who were HIV-positive or had other communicable diseases.

Petitioners are current and former prison officials. The successors in office have been included as petitioners before this Court because the injunctive relief ordered operates against the officials in their official capacity. Successors of public officials before the Court in their official capacity are automatically made parties. Sup. Ct. R. 35.3. The large number of petitioners is due to the district court's failure to direct the injunction toward any particular defendant official. Thus, the officials at trial and their successors are as follows:

Dick D. Moore	Former Director of the Missouri Department of Corrections (DOC)

Dora Schriro	Current Director of DOC (not a defendant at trial)
George Lombardi	Director of the Division of Adult Institutions of DOC
Bill Armontrout	Former Warden (now termed Superintendent) of JCCC
Michael Groose	Current Superintendent of JCCC (not a defendant at trial)
Loren Stout	Former administrator of JCCC Hospital (no comparable current position)
Richard Bowers	Former Chief Physician for DOC (no comparable current position)
Marilyn Butts	Former Health Care Supervisor at JCCC
Sister Dorothy Lauberth	Current RN Supervisor at JCCC (most comparable current position to Health Care Supervisor) (not a defendant at trial)
Cindy Haggart	Former Hospital Sergeant at JCCC
David Corum	Current Hospital Sergeant at JCCC (not a defendant at trial)
William Wieberg	Former Chief of Maintenance and Materials (M and M) section at JCCC
Louis Markway	Current Chief of M and M section at JCCC (not a defendant at trial)
Ed Hanauer	Maintenance supervisor at JCCC
Larry Neal	Maintenance supervisor at JCCC
Richard Bauman	Maintenance supervisor at JCCC

Carl Borghardt, Jr.	Maintenance supervisor at JCCC
Dennis Gately	Former maintenance supervisor at JCCC

This litigation began because the prisoners were involved in working on blocked or leaking sewer lines in the JCCC hospital and in cleaning the water from the floor of the hospital which overflowed from the sewer lines (Tr. 3-101, 3-104). The prisoners were employed by the facility as maintenance workers or plumbers. They testified that if they had been informed the waste water possibly contained communicable diseases they either would not have worked in it or they would have been more careful and taken advantage of the boots and gloves which were available (Supp. Tr. 1-109 to 1-110, Supp. Tr. 2-14, Supp. Tr. 2-35, Supp. Tr. 3-6 to 3-8). The prisoners testified that civilian plumbing supervisors worked alongside them in the clean up with the same protective clothing available to the inmate workers. (Supp.Tr. 1-43 to 1-44, Supp. Tr. 2-27 to 2-28, Supp. Tr. 2-31, Supp.Tr. 2-83, Supp.Tr. 2-88). The record shows that none of the prisoners contracted any condition or disease associated with sewage (Tr. 4-11; Tr. 4-50 to 4-51).

In 1987, gloves and rubber boots were available for use by the prisoners (Supp. Tr. 2-14; Tr. 3-6 to 3-8). At the time of trial in 1990, JCCC officials had available in the plumbing shop the following equipment for prisoners, as well as civilian workers:

8 pairs of rubber boots

4 face shields

surgical masks (in boxes of 100)

rubber gloves

(Tr. 2-49 to 2-50). The injunction entered requires provision of "sufficient numbers" of the following to inmates working in or around blocked sewer lines or raw sewage:

rubber boots

rubber gloves

leather gloves

surgical masks

face shields

A-14 to A-15. There are laundry facilities in the plumbing shop (Tr. 2-61). There are also two showers located in the shop and soap and other cleaning supplies are provided (Tr. 2-61). Prisoners assigned to the plumbing shop are allowed to shower any time in the shop and have their clothes washed there (Tr. 2-61). The inmate plumbers are not treated differently than the civilian plumbers with respect to clean up and laundry facilities (Tr. 2-61).

JCCC maintenance supervisors testified that the instructions they gave to inmate plumbers were no different at the time of the trial than they were in 1987 (Tr. 3-55). Prisoners have been consistently instructed not to do anything they think is unsafe and that at any time they get dirty to take a shower and change clothes (Tr. 3-53, Tr. 3-60). Prisoners have been consistently told that any sewer line at JCCC, in the hospital or otherwise, may connect to the living area of HIV-positive inmates (Tr. 3-78).

Eddie Hedrick, an epidemiologist, testified that HIV is a very fragile virus which dies rapidly outside the body (Tr. 3-8 to 3-9). There is no evidence of anyone becoming infected with HIV from sewage (Tr. 3-10). Contact with large volumes of sewage causes only a slight increase in the risk of some enteric type diseases, such as hepatitis A, salmonella, and shigella (Tr. 3-10 to 3-11). The risk of infection of enteric type diseases through sewage is minor (Tr. 3-11). Dr. David Tarlow, a physician presented by the prisoners, testified that the research on whether HIV can survive in sewage is inconclusive (Tr. 2-86).

Hedrick testified that maintenance people should protect themselves from infection by wearing gloves when working in sewage (Tr. 3-14). There is no need for gloves if the individual is not putting his or her hands directly into the sewage (Tr. 3-15). Dr. Richard Bowers, a physician formerly with the Department of Corrections, testified that prisoners working around sewage could protect themselves from infection by wearing gloves and cleaning up with soap and water (Tr. 4-19 to 4-20). Jerry Kramp, a plumber in the private sector, testified that the precaution plumbers typically take when working in raw sewage is to wear gloves and boots, if needed (Tr. 3-45).

At the close of plaintiffs' case, the district court directed verdicts in favor of defendants Armontrout, Moore, Lombardi, Wieburg, Gately, Hanauer, Borghart, Bauman, and Neal. A-17. Following the close of all the evidence, the prisoners submitted to the jury claims that defendants Bowers, Stout, Butts, and Haggart violated their constitutional rights by allowing the prisoners to be exposed to dangerous communicable diseases in sewage. A-16. The jury returned verdicts in favor of all defendants on all claims. A-16.

Thereafter, the district court denied the prisoners' motion for new trial. The court, however, finding that raw sewage presents potential health hazards and that the supply of protective clothing and equipment may not have been adequate, ordered injunctive relief against the officials. The court directed the "defendants" to provide general items of protective equipment and warnings to inmates assigned to work on or about sewer lines or raw sewage.[1] The district court did not specifically find that any individual official violated the Constitution.

---

[1] The injunctive relief entered is as follows:

IT IS, THEREFORE, ORDERED that defendants are henceforth required to provide sufficient numbers of rubber boots, rubber gloves, leather gloves,

(Footnote 1 continued on next page)

The officials appealed the entry of injunctive relief. The prisoners cross-appealed. The Eighth Circuit affirmed the rulings of the district court. The Eighth Circuit held that the district court had authority to award injunctive relief because the jury's factual findings were inconclusive, thereby permitting the court to supply its own factual findings to supplement the jury's verdict and serve as the basis for its equitable order. A-4 to A-6.

(Footnote 1 continued)

surgical masks, and face shields in the maintenance and plumbing department for use by each plumber's helper and/or inmate worker assigned to the plumbing shop. It is further

ORDERED that defendants henceforth provide sufficient numbers of rubber boots, rubber gloves, leather gloves, surgical masks, and face shields for use by other inmates assigned to work with clearing blocked sewer lines or cleaning up raw sewage. It is further

ORDERED that defendants permanently post adequate warning in at least two easily visible areas of the plumbing shop that inmate workers and others should wear appropriate protective clothing when working on or around sewer lines and/or raw sewage because of potential health hazards. A-14 to A-15.

REASONS FOR GRANTING THE WRIT

The Eighth Circuit's holding that injunctive relief was permissible despite verdicts in favor of state officials is contrary to decisions of this Court and an unprecedented expansion of federal court jurisdiction.

In this case, state officials were found innocent of any constitutional violation during a jury trial. Several officials received directed verdicts at the close of plaintiffs' case. Others received a favorable jury verdict. The district court did not find that any individual official violated the Constitution. Nevertheless, the district court imposed a mandatory, permanent injunction against these state officials and their successors.

This unprecedented expansion of federal jurisdiction is contrary to decisions of this Court, unnecessarily interferes with state officials and violates the Seventh Amendment.

I. Federal courts lack jurisdiction to order injunctive relief absent a finding of constitutional liability.

While a federal court possesses broad powers to remedy constitutional violations, as an initial matter, there must first be a finding that a constitutional violation exists. "[I]t is important to remember that judicial powers may be exercised only on the basis of a constitutional violation." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971). This Court recently emphasized that the "authority of the court is invoked at the outset to remedy particular constitutional violations." *Freeman v. Pitts*, 112 S.Ct. 1430, 1445 (1992).

In *Milliken v. Bradley*, 433 U.S. 267, 282 (1977), this Court emphasized that "federal-court decrees must directly address and relate to the constitutional violation itself." *See also*, *Freeman v. Pitts*, 112 S.Ct. at 1445. When there is no continuing violation of federal law, injunctive relief is not a part of a federal court's remedial powers. *See Green v. Mansour*, 474 U.S. 64, 71 (1985).

Federal appellate courts have reversed awards of equitable relief in similar situations. For instance, in *Lopez v. Garriga*, 917 F.2d 63, 66 (1st Cir. 1990), the plaintiff sought damages and equitable relief on his claims that his constitutional rights were violated when officers of the Immigration and Naturalization Service (INS) improperly detained and questioned him at an airport. The jury found plaintiff's rights had not been violated. *Id.* Notwithstanding the jury verdict, the district court enjoined INS officers from detaining and questioning certain persons at the airport. *Id.* at 67. The court of appeals reversed the grant of equitable relief, stating as follows:

> [O]nce the jury rejected plaintiff's constitutional claim, he was left without any sound basis for equitable relief. He no longer had standing to press for a restraining order or a declaratory judgment.

Id. at 70. Likewise, plaintiffs now before this Court were left without any sound basis for equitable relief once the jury rejected their constitutional claim. Other federal appellate decisions reversing awards of equitable relief due to jury verdicts inconsistent with such awards are *Kitchen v. Chippewa Valley Schools*, 825 F.2d 1004, 1014 (6th Cir. 1987), and *Butler v. Pollard*, 800 F.2d 223, 224 (10th Cir. 1986).

Here, prison officials were found not liable for violating the Constitution. Several officials, including all the officials involved in the maintenance department, received a directed verdict at the close of plaintiffs' case. In effect, the district court found that the prisoners failed to present sufficient evidence to show that these officials violated the Constitution. The remaining officials received a favorable jury verdict. At that point, the case should be over because federal courts simply do not have jurisdiction to enter a mandatory, permanent injunction absent a finding of a constitutional violation.

The district court's order imposing injunctive relief does not contain any finding that an individual state official violated the Constitution. It may be argued that the imposition of injunctive relief includes with it an implicit finding that the Constitution was violated somehow by someone. An implied constitutional violation, however, is inconsistent with this Court's requirement that an individual official have a specific culpable state of mind before he can be found liable for a constitutional violation. *See Wilson v. Seiter*, 111 S.Ct. 2321, 2324-26 (1991) (Eighth Amendment cases "mandate inquiry into a prison official's state of mind"; punishment requires intent).

When there has been no finding that a particular state official has violated the Constitution, Article III prohibits the federal courts from exercising jurisdiction to impose a mandatory, permanent injunction. The injunction in this case was issued without jurisdiction and contrary to the principles established by this Court governing injunctive relief.

II. A mandatory injunction, without a finding of constitutional liability, unnecessarily interferes with state officials.

This Court has repeatedly cautioned against unnecessary intervention into the operations of a prison.

> [C]ourts are ill equipped to deal with the increasingly urgent problems of prison administration and reform.
>
> . . .
>
> [T]he problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree.
>
> . . .
>
> Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of

> resources, all of which are peculiarly within the province of the legislative and executive branches of government.

Turner v. Safley, 482 U.S. 78, 84-85 (1987) (citing *Procunier v. Martinez*, 416 U.S. 396, 404-05 (1974)) (quotations omitted). This Court has emphasized its refusal to substitute its judgment on "'difficult and sensitive matters of institutional administration' . . . for the determinations of those charged with the formidable task of running a prison." *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 353 (1987) (quoting *Block v. Rutherford*, 468 U.S. 576, 588 (1984)).

Ironically, the Eighth Circuit previously recognized the importance of federal courts abstaining from "imposing strict standards of conduct, in the form of injunctions, on prison officials in the absence of a concrete showing of a valid claim and constitutionally mandated directives for relief." *Rogers v. Scurr*, 676 F.2d 1211, 1214 (8th Cir. 1982). One federal court stated:

> In the area of state prisons, the federal courts should refuse to interfere with internal state prison administration except in the most extreme cases involving a shocking deprivation of rights.

Afrika v. Selsky, 750 F.Supp. 595, 603 (S.D. N.Y. 1990).

In this case, there has not been any constitutional violation at all, let alone a shocking deprivation of rights. This is the extreme case where a federal court imposes a mandatory, permanent injunction when no individual's rights have been violated and when no individual official has been found guilty of a constitutional violation. The injunctive relief entered in this case does not further this Court's policy of according deference to the determinations of prison authorities.

Further, the injunction unnecessarily interferes with state officials even if this Court assumes the district court found a constitutional violation. The power of a federal court to issue

injunctive relief is circumscribed by the nature and extent of the constitutional violation. *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 419-20 (1977). The injunction "must directly address and relate to the constitutional violation itself." *Milliken*, 433 U.S. at 282. Because of the inherent limitation upon federal judicial authority, "federal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation." *Id.*

The intrusion in this case is readily apparent by comparing the items available with the items ordered by the district court. JCCC officials have available in the plumbing shop the following equipment for prisoners, as well as civilian workers:

8 pairs of rubber boots;

4 face shields;

Surgical masks (in boxes of 100);

Rubber gloves.

(Tr. 2-49 to 2-50). The injunction entered requires provision of "sufficient numbers" of the following to prisoners working in or around blocked sewer lines or raw sewage:

Rubber boots;

Rubber gloves;

Leather gloves;

Surgical masks;

Face shields.

A-14 to A-15. These lists are nearly identical. The district court determined it should invoke the weighty hand of the federal court to require the provision of one additional type of equipment

(leather gloves) than was already provided by prison authorities. The lower court's order requiring prison officials to provide items to prisoners already available to them is a clear example of a federal court substituting its judgment for decisions made by officials entrusted with the administration of the prison.

The warnings which the district court ordered posted also represent a substitution of the court's judgment for that of prison administrators. JCCC maintenance supervisors chose to orally inform prisoners that any sewer line, in the hospital or otherwise, may connect to the living area of HIV-positive prisoners (Tr. 3-78). Ironically, the Eighth Circuit has noted that common sense suggests that a person should have knowledge that unprotected contact with human waste can cause disease. *Fruit v. Norris,* 905 F.2d 1147, 1150-51 (8th Cir. 1990). Thus, the "permanent" warnings ordered by the district court are redundant, unduly interfere in the operation of the maintenance department, and subject prison officials to further litigation on the "adequacy" and "visibility" of the warnings.

In entering its injunctive order, the district court indicated it was not certain whether the protective equipment available at JCCC was available in adequate supply. A-14. Yet, without reaching a conclusion on this issue, the district court ordered provision of "sufficient numbers" of boots, gloves, surgical masks, and face shields.

This was improper because first, the jury had already determined prison officials' sewage clean up operations had violated no constitutional rights of the prisoners. Second, even if the court could have departed from the jury's determination of no constitutional violation, it should not have exercised its equitable powers without a specific conclusion that supplies provided to inmates were, in fact, inadequate. Third, the actions required to be done by the injunction are not sufficiently definite. The injunction itself raises many unanswered questions. For

example, what is a "sufficient number" of boots, gloves, masks, and face shields? Who, specifically, is bound by the injunction? What is an "adequate warning"? These questions bring home the validity of the Court's concern that federal courts not become enmeshed in the minutiae of prison operations. *See Bell v. Wolfish*, 441 U.S. 520, 562 (1979). Here, state officials are in constant danger of being hauled back into court on contempt motions. The lack of specificity in the injunctive order violates Rule 65(d), Fed.R.Civ.P., which requires "reasonable detail" and further requires the injunction "shall be specific in terms."

Because of the mandatory, permanent injunction, prison officials are "henceforth" (A-14 to A-15) faced with this risk. Even though prison officials were already providing almost all of the items ordered by the district court, this challenge to the injunction is not merely academic. In the Eleventh Amendment context, this Court has held that these concerns are sufficiently valid to justify dismissal of a mandatory injunction. *See Alabama v. Pugh*, 438 U.S. 781, 782 (1978) ("Alabama has an interest in being dismissed from this action in order to eliminate the danger of being held in contempt if it should fail to comply with the mandatory injunction"). The intrusive aspect of the mandatory, permanent injunction, entered without jurisdiction interferes with state officials and forever subjects state officials, and their successors, to unnecessary risks.

The officials are also harmed because of the assessment of attorneys' fees and the potential for future fee liability in contempt motions. Here, the prisoners requested $11,100 in fees and expenses. The lower court awarded approximately $6,000. State officials must pay the fee award even though no individual state official has been found liable for a constitutional violation.

The effect of the Eighth Circuit's holding is to expand federal jurisdiction and multiply court proceedings. Especially in prisoner cases, state officials, after incurring the burden and expense

of a jury trial, can be forced into a separate proceeding to determine if injunctive relief is warranted. Prisoners could always argue that the general jury verdict is inconclusive and ask the court to conduct additional hearings, make supplemental findings and impose mandatory, permanent injunctions. Review by this Court is necessary to protect limited state and judicial resources.

III. Injunctive relief against prison officials who receive a favorable jury verdict violates the Seventh Amendment.

The Seventh Amendment to the United States Constitution insures that "the right of trial by jury shall be preserved." Where a case involves a jury deciding legal claims and a court determining equitable ones, any factual issues central to both claims must be tried to the jury first so that the parties' Seventh Amendment jury trial rights are not foreclosed on common factual issues. *Dairy Queen, Inc., v. Wood*, 369 U.S. 469, 472-73 (1962); *Beacon Theatres, Inc., v. Westover*, 359 U.S. 500, 510-11 (1959).

> When a party has the right to a jury trial on an issue involved in a legal claim, the judge is of course bound by the jury's determination of that issue as it affects his disposition of an accompanying equitable claim.

Lincoln v. Board of Regents, 697 F.2d 928, 934 (11th Cir.), *cert. denied*, 464 U.S. 826 (1983).[2] The jury in this case found that

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[2] Other circuits, including the Eighth Circuit, are nearly unanimous in holding that a jury's fact finding is binding upon the court when it is deciding accompanying equitable claims. *See, e.g., Lopez v. Garriga*, 917 F.2d 63, 67-68 (1st Cir. 1990); *Wade v. Orange County Sheriff's Office*, 844 F.2d 951, 954 (2d Cir. 1988); *Cox v. Keystone Carbon Co.*, 861 F.2d 390, 394 (3d Cir. 1988); *Ward v. Texas Employment Comm'n*, 823 F.2d 907, 908-909 (5th Cir. 1987); *Kitchen v. Chippewa Valley Schools*, 825 F.2d 1004, 1014 (6th Cir. 1987);

(Footnote 2 continued on next page)

defendants did not violate the prisoners' constitutional rights. Under the line of cases descending from *Dairy Queen* and *Beacon Theatres,* the district court was bound by the Seventh Amendment to accept this finding of no constitutional violation.

In this case, the Eighth Circuit sought to distinguish the *Dairy Queen* and *Beacon Theatres* holdings by citing *Charles Jacquin Et Cie v. Destileria Serralles, Inc.*, 921 F.2d 467, 472 (3d Cir. 1990). There, the court held that a district court, in crafting injunctive relief, properly supplies its own factual findings to supplement jury findings in special verdicts where the factual findings set out in the special verdicts are inconclusive or incomplete. The Eighth Circuit applied this holding to this case, and found that the jury's general verdicts in favor of defendants were inconclusive.

> [T]he general verdict directive did not allow the jury to make specific factual findings upon which the district court could rely when crafting or denying the injunction. The general verdict form listed seven elements the plaintiffs had to establish to prove a constitutional violation and the jury could have found the plaintiffs failed to establish any one of the seven elements. For instance, the jury may have believed the defendants were recklessly indifferent to the health needs of the inmates and still found for the defendants because the inmates suffered no damages. The return of a general verdict prevented the court from ascertaining the jury's specific factual findings, and it was therefore,

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(Footnote 2 continued)

McKnight v. General Motors Corp., 908 F.2d 104, 113 (7th Cir. 1990), *cert. denied,* 111 S.Ct. 1306 (1991); *Peery v. Brakke*, 826 F.2d 740, 747 (8th Cir. 1987); *GTE Sy'vania, Inc., v. Continental T.V., Inc.*, 537 F.2d 980, 986 n. 7 (9th Cir. 1976), *aff'd*, 433 U.S. 36 (1977); *Skinner v. Total Petroleum, Inc.*, 859 F.2d 1439, 1443 (10th Cir. 1988); *Bouchet v. National Urban League, Inc.*, 730 F.2d 799, 803 (D.C. Cir. 1984).

proper for the court to supply its own factual findings to supplement the jury's verdict.

A-5.[3]

It is so that the jury could have believed defendants to be recklessly[4] indifferent to the health needs of the plaintiff but

---

[3] The verdict directing instruction provided as follows:

INSTRUCTION NO. 12

Your verdict must be for a plaintiff and against a defendant if all of the following elements have been proved by the preponderance of the evidence as to that plaintiff and that defendant:

First, dangerous, communicable diseases, which can be transmitted through contact with the sewage, were present in the sewage in the clogged sewer pipes in June and/or July, 1987;

Second, the defendant knew such diseases were probably present in the sewage and that they can be transmitted through contact with the sewage;

Third, the plaintiff did not know such diseases were probably present in the sewage or that they can be transmitted through contact with the sewage;

Fourth, there was a substantial danger of becoming infected with such diseases from contact with the sewage without protective clothing;

Fifth, the defendant, with deliberate indifference to or reckless disregard for the substantial risk to the plaintiff's health and safety, failed to warn the plaintiff of the danger of contact with the sewage;

Sixth, the plaintiff was exposed to such dangerous, communicable diseases in June and/or July, 1987, through his work at the Missouri State Penitentiary hospital; and

Seventh, as a direct result, the plaintiff sustained damage.

A-8.

[4] In light of *Wilson v. Seiter*'s holding that the Eighth Amendment requires an intentional state of mind, recklessness is not sufficient to violate the Constitution.

found for defendants because plaintiffs were not damaged. This, however, does not make the general verdicts inconclusive with respect to whether the district court had jurisdiction to award equitable relief. Damages must exist in order for there to be an Eighth Amendment violation. *Stewart v. McManus*, 924 F.2d 138, 143 (8th Cir. 1991); *Cowans v. Wyrick*, 862 F.2d 697, 699 (8th Cir. 1988). *See also Hudson v. McMillian*, 112 S.Ct. 995, 1000 (1992) ("Eighth Amendment's prohibition of 'cruel and unusual' punishment necessarily excludes from constitutional recognition de minimis uses of physical force"). Thus, even if the jury found the existence of each of the elements hypothesized in the verdict directing instruction except for the element of damages, there is still no constitutional violation.

A fatal flaw in the Eighth Circuit's reasoning is that a nominal damage instruction was submitted to the jury allowing a finding of constitutional liabiltiy without actual damages. By rejecting nominal damages, the jury necessarily found other elements of the claim lacking.

In order for there to be a constitutional violation each of the elements must be found to exist. In finding for defendants, the jury obviously found that at least one of the hypothesized elements, other than damages, was not proven. Where even one of the elements has not been proven, there is no constitutional violation. Therefore, the jury verdict in favor of defendants conclusively establishes that there was no violation of plaintiffs' constitutional rights. The district court was required to accept this conclusive finding of no constitutional violation.

An interesting aspect of this issue concerns the directed verdicts at trial. The only claims submitted to the jury were against officials responsible for the operation of the hospital. All of the maintenance supervisors received a directed verdict at the close of plaintiffs' case. The Eighth Circuit's speculation about the jury findings are not relevant to the claims against the

maintenance supervisors, the apparent primary target of the mandatory, permanent injunction. The maintenance supervisors, and their successors, are subject to the injunction even though the claims against them were decided by directed verdict and not submitted to the jury.

A prerequisite to an award of injunctive relief is a finding by the court that defendants have violated plaintiffs' rights. *Swann*, 402 U.S. at 16. Given that the court in this case was bound to accept the jury's finding that there was no violation of plaintiffs' rights, a necessary prerequisite to injunctive relief was absent. Thus, the court lacked authority to order injunctive relief and the mandatory, permanent injunction violates the Seventh Amendment.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

DON M. DOWNING
Deputy Attorney General

BRUCE FARMER*
MICHAEL E. PRITCHETT
Assistant Attorneys General

Counsel for Petitioners

**Counsel of Record*

APPENDIX

APPENDIX A

SUPREME COURT OF THE UNITED STATES

No. A-547

William Armontrout, et al.,
Petitioners

v.

Michael Burton, et al.

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including February 15, 1993.

/s/Harry A. Blackmun
Associate Justice of the Supreme
Court of the United States

Dated this 19th day of January, 1993.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 91-2831/3069WMJC

Michael Burton, et al.,
Appellees,

vs.

William Armontrout, et al.,
Appellants.

Order Denying Petition for Rehearing and
Suggestion for Rehearing En Banc

The Suggestion for rehearing en banc is denied. The petition for rehearing is also denied.

October 28, 1992

Order Entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk, U. S. Court of Appeals, Eighth Circuit

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 91-2831WM
No. 91-3069 WM

Michael Burton; Kenneth Charron; Joe Cooper;
John Murrain; Michael Nelson; Fred Taylor;
Ricky J. Vanoster; William Wirth; Thomas Lee Umphrey,
Appellees,

v.

William Armontrout; Richard Bauman; Carl Borghart, Jr.;
Richard Bowers; Marilyn Butts; Dennis Gately;
Cindy Haggart; Ed Hanauer; George Lombardi; Dick Moore;
Larry Neal; Loren Stout; William Weiburg,
Appellants.

Appeal from the United States District Court
for the Western District of Missouri.

Submitted: June 11, 1992
Filed: September 21, 1992

Before JOHN R. GIBSON, Circuit Judge, FLOYD R. GIBSON,
Senior Circuit Judge, and BEAM, Circuit Judge.

FLOYD R. GIBSON, Senior Circuit Judge.

William Armontrout appeals the district court's[1] order granting injunctive relief to inmates at the Jefferson County Correctional Center ("JCCC"). The inmates cross-appeal alleging the district court erred in directing verdicts in favor of nine defendants. We affirm.

---

[1] The Honorable William A. Knox, United States Magistrate Judge for the Western District of Missouri.

I. BACKGROUND

The appellees are inmates and former inmates of the JCCC. In June 1987, the inmates were involved in a large-scale cleanup of sewage at the JCCC hospital. On September 18, 1987, Thomas Umphrey filed suit alleging JCCC correctional officers violated his constitutional rights by failing to warn him that the sewage was contaminated with the AIDS virus and other infectious diseases. In 1988, Michael Burton and other inmates also filed suit alleging claims similar to those raised by Umphrey. On June 23, 1989, the district court consolidated these suits and the parties consented to present the case to a magistrate. At the close of the plaintiff's evidence, the court directed verdicts in favor of nine defendants; at the close of trial, the jury returned verdicts in favor of the remaining four defendants. The parties then submitted post-trial briefs concerning the issue of injunctive relief, and the inmates filed a motion for new trial. The court denied the inmates' motion for new trial, but granted limited injunctive relief in favor of the inmates. Armontrout and the inmates appeal.

II. DISCUSSION

Armontrout argues the district court lacked jurisdiction to order injunctive relief because the court and the jury determined the correctional officers did not violate the inmates' constitutional rights. Courts have broad discretionary power to order injunctive relief,*Taylor Bay Protective Ass'n v. Administrator, United States E.P.A.*, 884 F.2d 1073, 1079 (8th Cir. 1989) (quotation and citation omitted), and we review the district court's grant of injunctive relief for abuse of discretion. *International Ass'n of Machinists v. Soo Line R.R. Co.*, 850 F.2d 368, 374 (8th Cir. 1988) (en banc), *cert. denied*, 489 U.S. 1010 (1989) (citations omitted). "Abuse of discretion occurs if the district court rests its conclusion on clearly erroneous factual findings or if its decision relies on erroneous legal conclusions." *Id.* Al-

though the district court must grant equitable relief that is "consistent with the facts as found by the jury," *Perry v. Brakke*, 826 F.2d 740, 746 (8th Cir. 1987), the court may grant injunctive relief despite a jury's determination that defendants are not liable for damages. *See Johnson v. Bowers*, 884 F.2d 1053, 1056 (8th Cir. 1989) (court ordered injunctive relief for inmate despite jury verdict in favor of prison doctors). In ordering this relief, the court may rely on evidence not presented to the jury when the jury's factual findings are incomplete or inconclusive. *See Charles Jacquin Et Cie, Inc. v. Destileria Serralles, Inc.*, 921 F.2d 467, 472 (3d Cir. 1990). In this case, the jury's findings are inconclusive because the general verdict directive did not allow the jury to make specific factual findings upon which the district court could rely when crafting or denying the injunction. The general verdict form listed seven elements the plaintiffs had to establish to prove a constitutional violation and the jury could have found the plaintiffs failed to establish any one of the seven elements. For instance, the jury may have believed the defendants were recklessly indifferent to the health needs of the inmates and still found for the defendants because the inmates suffered no damages. The return of a general verdict prevented the court from ascertaining the jury's specific factual findings, and it was therefore, proper for the court to supply its own factual findings to supplement the jury's verdict.

Prior to making supplemental findings, the court heard additional testimony from Herschell Larimore, a maintenance supervisor at the JCCC. Larimore stated that in March 1990, neither inmates nor civilians were warned that they would be working with potentially dangerous waste from AIDS patients at the facility. Additional evidence demonstrated that despite the passage of three years and the greater awareness of the dangers of AIDS, prison officials had failed to provide adequate protective clothing. The district court also noted this circuit has held that exposure to raw sewage can present potential health hazards in violation of a prisoner's constitutional rights. *Fruit v. Norris*,

905 F.2d 1147, 1151 (8th Cir. 1990) ("[w]e believe forcing inmates to work in a shower of human excrement without protective clothing and equipment would be 'inconsistent with any standard of decency.'") (citation omitted). After hearing the additional evidence, the court ordered a limited injunction[2] requiring JCCC to provide adequate protective clothing and warnings to inmates of the potential danger of working in contaminated waste. Keeping in mind that "equitable remedies are a special blend of what is necessary, what is fair, and what is workable," *Lemon v. Kurtzman*, 411 U.S. 192, 200 (1973) (footnote omitted), we hold the district court did not abuse its discretion in ordering the injunction.[3]

The inmates cross-appeal, alleging the district court erred in directing verdicts in favor of nine defendants at the close of the inmates' case. They argue they submitted sufficient evidence to send the cases to the jury, and reasonable jurors could differ as to whether the defendants had notice of the dangerous condition of the sewage. In deciding whether to grant or deny a motion for a directed verdict, a court must:

> (1) resolve direct factual conflicts in favor of the nonmovant, (2) assume as true all facts supporting the nonmovant which the evidence tended to prove, (3) give the nonmovant

---

[2] The injunction ordered the defendants "to provide sufficient numbers of rubber boots, rubber gloves, leather gloves, surgical masks, and face shields in the maintenance and plumbing department . . . [and] permanently post adequate warning in at least two easily visible areas of the plumbing shop that inmate workers and others should wear appropriate protective clothing when working on or around sewer lines and/or raw sewage because of potential health hazards."

[3] We also reject the inmates' claim that the court abused its discretion in ordering a limited injunction. The court appropriately tailored the injunction to the specific concerns of the inmates, and any broader injunctive relief would unduly infringe on the prison official's day to day administration of JCCC.

> the benefit of all reasonable inferences, and (4) deny the motion if the evidence so viewed would allow reasonable jurors to differ as to the conclusions that could be drawn.

Porm v. White, 762 F.2d 635, 637 (8th Cir. 1985) (citation omitted). In reviewing the district court's decision, we apply the same standard. *City Nat. Bank of Ft. Smith v. Unique Structures*, 929 F.2d 1308, 1312 (8th Cir. 1991).

To prevail on their Eighth Amendment claim, the inmates had to show the correctional officers were deliberately indifferent to the risk of harm posed to inmates working with the dangerous sewage. *Bailey v. Wood*, 909 F.2d 1197, 1199 (8th Cir. 1990). To establish reckless disregard, the inmates had to show the correctional officers failed to respond reasonably to that risk. *Id.* There was insufficient evidence presented at trial to indicate the correctional officers knew the sewage was contaminated with infectious diseases and presented a dangerous health risk to those inmates who worked in the cleanup operation. Because there was not substantial evidence to support a verdict in favor of the inmates, we hold the court did not err in granting the motion for a directed verdict. *City Nat. Bank*, 929 F.2d at 1312.

The inmates also allege the court erred in allowing the testimony of Eddie Headrick, an epidemiologist who testified as to the risks of infection from contact with sewage. We review a trial court's ruling with respect to witness testimony under an abuse of discretion standard. *Morfeld v. Kehm*, 803 F.2d 1452, 1455-56 (8th Cir. 1986). The inmates argue they were not allowed adequate time to prepare for cross-examination because the defendants' witness list listing Headrick was not filed until the day before trial. The inmates, however, may not allege prejudicial error or surprise because they included Headrick on their witness list, which was submitted the day of trial. Thus, the inmates should have anticipated the nature of his testimony and cannot claim the court abused its discretion in allowing the testimony. *See id.*

Finally, the inmates allege the court erred in instructing the jury concerning the elements of a constitutional violation under 18 U.S.C. § 1983.[4] A district court has broad discretion in framing jury instructions, *United States v. Coney*, 949 F.2d 966, 967-68 (8th Cir. 1991), and our role is to determine "whether the instructions, taken as a whole and viewed in light of the evidence and the applicable law, fairly and adequately submitted the issues in the case to the jury." *Jones v. Board of Police Comm'rs*, 844 F.2d 500, 504 (8th Cir. 1988), *cert. denied*, 490 U.S. 1092 (1989). The inmates contend the burden placed on the plaintiffs to prove that infectious diseases were actually present in the sewage was insurmountable, and the court should have included

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[4] Instruction No. 12 stated:

> Your verdict must be for a plaintiff and against a defendant if all of the following elements have been proved by the preponderance of the evidence as to that plaintiff and that defendant:
>
> *First*, dangerous, communicable diseases, which can be transmitted through contact with the sewage, were present in the sewage in the clogged sewer pipes in June and/or July, 1987;
>
> *Second*, the defendant knew such diseases were probably present in the sewage and that they can be transmitted through contract with the sewage;
>
> *Third*, the plaintiff did not know such diseases were probably present in the sewage or that they can be transmitted through contact with the sewage;
>
> *Fourth*, there was a substantial danger of becoming infected with such diseases from contact with the sewage without protective clothing;
>
> *Fifth*, the defendant, with deliberate indifference to or reckless disregard for the substantial risk to the plaintiff's health and safety, failed to warn the plaintiff of the danger of contact with the sewage;
>
> *Sixth*, the plaintiff was exposed to such dangerous, communicable diseases in June and/or July, 1987, through his work at the Missouri State Penitentiary hospital; and
>
> *Seven*, as a direct result, the plaintiff sustained damage.

a phrase relating to the defendants' failure to provide protective clothing. We find no merit in the inmates' claims. This case hinged on the defendants' knowledge that the inmates were being exposed to potentially infectious sewage contaminated by AIDS patients housed at the JCCC hospital. The availability of protective clothing was not crucial to this issue; thus, the court did not abuse its discretion in refusing to include a phrase concerning the defendants' failure to provide protective clothing. The jury instruction was a proper statement of the law and the district court's failure to instruct the jury as the inmates requested was not an abuse of discretion.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

Consolidated Cases
No. 88-4521-CV-C-66BA
No. 87-4435-CV-C-66BA

RICKY J. VANOSTER, et al.,
Plaintiffs,

v.

DICK MOORE, et al.,
Defendants.

ORDER

[Filed: Mar. 12, 1991]

On November 8, 1990, plaintiffs filed a motion for new trial on the following grounds:

(1) It was error and/or an abuse of discretion to permit Eddie Hedrick and Jerry Kramp to testify as expert witnesses because they had not been endorsed until the day of trial;

(2) It was error and/or abuse of discretion to set aside the default entered against defendants as a condition of plaintiffs receiving a jury trial'

(3) There was jury misconduct in the deliberations;

(4) Plaintiffs subpoenaed the medical records for trial but were not given the records;

(5) There has been new evidence revealed in recent British Medical Journals; and

(6) Each of the plaintiffs is being retaliated against for filing suit and testifying at trial.

Defendants responded to each of the above allegations on November 16, 1990.

"Generally, new trials are granted only if the record presents prejudicial error or substantial justice has not been done." *Comerio v. Beatrice Foods Co.*, 616 F. Supp. 1423, 1428 (E.D. Mo. 1985). The burden of demonstrating the verdict was against the weight of the evidence or showing prejudicial error is on the moving party. *Id.* Here, plaintiffs have not persuaded the court there was prejudicial error in this case or that substantial justice has not been done. Thus, in light of the above standards and for the reasons set forth below, plaintiffs' motion for a new trial will be denied.

Plaintiffs' witness list, submitted the day of trial[1], listed "Eddie Hedrick, Infection Control Dept., University of Missouri Medical Center, Columbia, 882-2264." Defendants' witness list, filed the day before trial, also listed Eddie Hedrick and defendants called Hedrick to testify. Plaintiffs cannot assert prejudicial error or surprise by the defendants calling a witness whom plaintiffs endorsed.

Additionally, the testimony of Jerry Kramp, a plumber, regarding plumbing practices relating to protective clothing and work in raw sewage, should not have surprised plaintiffs in light of their allegations. Furthermore, Kramp was not endorsed as, and did not testify as, an expert regarding diseases found in sewage. He testified as a licensed plumber.

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[1] Plaintiffs' list of witnesses was submitted to the court on the day of trial. Due to a clerical error, the witness list was accepted by the court but not docketed. Thus, plaintiffs' original witness list will be attached to this order and made a part hereof.

Plaintiffs next assert it was error for the Honorable Scott O. Wright to set aside the default judgment as a condition to trial by a jury. Plaintiffs cite no case support for this proposition. To the contrary, "it is generally held that neither party has a constitutional right to a jury trial on the issue of damages after entry of default (citations omitted)." *Goodman v. Lattimore*, No. 79 Civ. 4501, slip op. (S.D.N.Y. Jan. 6, 1981); *Kormes v. Weis, Voisin and Co.*, 61 F.R.D. 608 (E.D. Pa. 1974); *Martin v. Detroit Marine Terminals, Inc.*, 189 F. Supp. 579 (E.D. Mich. 1960). Furthermore, plaintiffs did not raise this issue prior to the jury trial.

Plaintiffs further assert jury misconduct because "one juror stated they could not believe that a warden would take the risk of being sued by subjecting inmates to contagious diseases because 'then he would be sued.' " Doc. 111, p. 4. As stated by defendants in their response, "the statements attributed to the jury do not objectively indicate 'that the jury's verdict was based on considerations other than the evidence presented' and thus do not support a new trial." Doc. 112, p. 4.

Plaintiffs introduced their medical records into evidence at various times during the testimony on October 23 and 24, 1990, and did not indicate to the court that they were incomplete or not the records which they had subpoenaed. Furthermore, plaintiffs called Frank Schroeder, the medical records custodian, and could have asked him while he was on the stand whether he had brought the subpoenaed records. Then, counsel could have requested a recess, if necessary, to review those records.

Lastly, plaintiffs' reliance on evidence revealed in recent British Medical Journals and plaintiffs' claims that they have been retaliated against since the filing of this lawsuit and their testifying at trial are not sufficient grounds to justify a new trial. Such matters do not show justice was not done or that prejudicial error was committed during the trial of this case.

On November 20, 1990, defendants filed a motion to dismiss plaintiffs' claims for injunctive relief on the grounds that such relief is precluded by the jury's finding there was no violation of plaintiffs' constitutional rights. Plaintiffs responded to defendants' position but failed to cite case law in support.

A similar issue was addressed last year in *Johnson v. Bowers*, No. 88-2641, slip op. (8th Cir. 1989) when Johnson appealed an adverse jury verdict. The jury verdict was upheld but the case was remanded to the district court to enter an appropriate order regarding injunctive relief. Thus, the clear implication of that order was that injunctive relief is not precluded by a jury verdict in favor of defendants.

The federal courts have broad power to grant or deny equitable relief in a civil rights action. *Holt v. Sarver*, 442 F.2d 304 (8th Cir. 1971); *Knowles v. Board of Public Instruction*, 405 F.2d 1206, 1207 (5th Cir. 1969); *Johnson v. Lark*, 365 F. Supp. 289, 304 (E.D. Mo. 1973). However, a "large degree of discretion is vested in the trial court" in determining whether an injunction should issue. *American Home Investment Co. v. Bedel*, 525 F.2d 1022, 1023 (8th Cir. 1975), *cited with approval in Rittmiller v. Blex Oil, Inc.*, 624 F.2d 857 (8th Cir. 1980). Further, injunctive relief is considered an "extraordinary remedy." *See* 11 C. Wright & A. Miller, *Federal Practice and Procedure*, § 2942 at 368 (1973). As such, federal courts should not employ their equitable power to interfere with the internal administration of state correctional facilities absent a clear showing of a violation of federally protected rights. *Rogers v. Scurr*, 676 F.2d 1211, 1214 (8th Cir. 1982); *Anderson v. Hascall*, 566 F. Supp. 1492, 1495 (D. Minn. 1983). Traditionally, "the main prerequisite to obtaining injunctive relief is a finding that plaintiff is being threatened by some injury for which he has no adequate legal remedy." 11 C. Wright & A. Miller, *Federal Practice and Procedure*, § 2941 at 368-69. The burden of proving these prerequisites is on the party seeking the relief. *United States v. Dorgan*, 522 F.2d 969,

973 (8th Cir. 1975). Thus, to obtain permanent injunctive relief, a party must show first, his rights have been violated; second, there is a threat of future violation; and third, such threat is more than a "mere possibility." *Rogers v. Scurr*, 676 F.2d at 1214. And the federal courts must use restraint "in dealing with the complex and intractable problems of prison administration." *Id.* *See also Bell v. Wolfish*, 441 U.S. 520, 547 (1979).

Here, evidence presented at trial clearly indicates inmates worked and continue to work as plumbers' helpers in the plumbing and/or maintenance department at Missouri State Penitentiary. Evidence presented also indicated that rubber gloves and boots were available to plumbing shop workers, although there may not have been an adequate supply.[2] It was also clear that if individuals work in raw sewage, there is a real possibility of getting raw sewage on their hands and feet and that raw sewage presents potential health hazards. *See also Fruit v. Norris*, 905 F.2d 1147 (8th Cir. 1990) ("[w]e believe forcing inmates to work in a shower of human excrement without protective clothing and equipment would be " 'inconsistent with any standard of decency.'" *Howard v. Adkison*, 887 F.2d at 137 (quoting *Toussaint v. McCarthy*, 597 F. Supp. 1388, 1411 (N.D. Cal. 1984) (subsequent history omitted)).")

Defendants assert there are currently gloves, boots and visors available in the maintenance department for plumbing helpers. Defendants' assertion, however, does not indicate whether there are sufficient numbers of those items for all inmate workers who will work in raw sewage.

IT IS, THEREFORE, ORDERED that defendants are henceforth required to provide sufficient numbers of rubber boots, rubber gloves, leather gloves, surgical masks, and face shields in

[2] Donald Bax, a maintenance supervisor at Missouri State Penitentiary, testified at trial that there were approximately eight pairs of rubber boots, four face shields, hundreds of surgical masks.

the maintenance and plumbing department for use by each plumber's helper and/or inmate worker assigned to the plumbing shop. It is further

ORDERED that defendants henceforth provide sufficient numbers of rubber boots, rubber gloves, leather gloves, surgical masks, and face shields for use by other inmates assigned to work with clearing blocked sewer lines or cleaning up raw sewage. It is further

ORDERED that defendants permanently post adequate warning in at least two easily visible areas of the plumbing shop that inmate workers and others should wear appropriate protective clothing when working on or around sewer lines and/or raw sewage because of potential health hazards. It is further

ORDERED that plaintiffs' motion for a new trial is hereby denied. It is further

ORDERED that defendants' motion to dismiss plaintiffs' request for injunctive relief in this case is denied.

Dated this 12th day of March, 1991.

/s William A. Knox
WILLIAM A. KNOX
United States Magistrate Judge

APPENDIX E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI

Case Number:
88-4521-CV-C-66BA
87-4435-CV-C-66BA

Ricky J. Vanoster, et al.,

v.

Dick Moore, et al.

JUDGMENT IN A CIVIL CASE

[Filed: Oct. 29, 1990]

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered

IT IS ORDERED AND ADJUDGED

on plaintiff Umphrey's, Burton's, Nelson's, Vanoster's, Murrain's, Taylor's, Wirth's, Charron's, and Cooper's claims against defendants Stout, Bowers, Butts, and Haggart, the jury unanimously finds in favor of defendants.

entered on October 26, 1990

Oct. 29, 1990
Date

Robert F. Connor
Clerk

/s/ K. Markway
(By) Deputy Clerk

APPENDIX F

IN THE UNITED STATES COURT FOR THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

Consolidated Cases
No. 88-4521-CV-C-66BA
No. 87-4435-CV-C-66BA

RICKY J. VANOSTER, et al.,
Plaintiffs,

v.

DICK MOORE, et al.,
Defendants.

ORDER

[Filed: Oct. 30, 1990]

Defendants moved for a directed verdict as to all defendants and all claims at the close of plaintiffs' case on October 25, 1990. Plaintiffs objected thereto and oral argument was heard. The court ruled on defendants' motion and defendants moved for summary judgment based on qualified immunity as to the remaining damage claims.

IT IS, THEREFORE, ORDERED that defendants' motion for a directed verdict at the close of plaintiffs' case is denied as to defendants Loren Stout, Richard Bowers, Marilyn Butts and Cindy Haggart and is granted as to the damage claims against defendants Dick Moore, George Lombardi, Bill Armontrout, William Weiburg, Dennis Gately, Ed Hanauer, Carl Borghart, Jr., Richard Bauman, and Larry Neal. It is further

ORDERED that a ruling on defendants' motion for summary judgment on the remaining damage claims based on qualified immunity is stayed pending the return of verdict by the jury.

Dated this 30 day of October, 1990.

/s/William A. Knox
WILLIAM A. KNOX
United States Magistrate

Supreme Court, U.S.
FILED
MAY 19 1993
OFFICE OF THE CLERK

No. 92-1361

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

BILL ARMONTROUT, et al.,
Petitioners,

VS.

MICHAEL BURTON, et al.,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

JEANENE MOENCKMEIER
777 South Highway 101
Suite 210
Solana Beach, California 92075
(619) 793-1139
(800) 331-8406

Attorney for Respondents

St. Louis Law Printing, Inc. 13307 Manchester Rd. St. Louis, MO 63131 314-231-4477

QUESTION PRESENTED

Does a federal court have jurisdiction to grant injunctive relief when the individual defendants have received a directed verdict in their favor as to damages only (with no specific finding that they did not violate the Constitution), or a general jury verdict in their favor (with no specific finding that the defendants did not violate the Constitution)?

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Constitutional Provisions:

U.S. Const. Amend. VII iii,5,12, 13,14,15

No. 92-1361

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

BILL ARMONTROUT, et al.,
Petitioners,

VS.

MICHAEL BURTON, et al.,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

The respondents respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Eighth Circuit's opinion in this case. That opinion is reported at *Burton v. Armontrout*, 975 F.2d 543 (8th Cir. 1992).

STATEMENT OF THE CASE

The respondents are inmates and former inmates of the Jefferson City Correctional Center (JCCC), formerly known as the Missouri State Penitentiary. The petitioners are current and former prison officials.

In June and July of 1987, the respondents were involved in a massive cleanup of sewage which caused flooding several times

at the JCCC hospital (II App. 25-29, App. 039-041). The inmates were required to work in raw sewage in order to repair blocked or leaking sewer lines and in cleaning the sewage and water from the floor of the hospital which had overflowed from the sewage lines (Tr. 3-101, 3-104). The inmates were exposed to dangerous communicable diseases, including AIDS, because of their work in the raw sewage of patients at the hospital who had AIDS or had tested HIV positive, or had other communicable diseases. None of the inmates were warned by prison officials of the potential health hazards or life-threatening risks involved in working in the sewage, nor were they given adequate protective clothing by officials. Each of the inmates had open wounds, cuts or bruises which were exposed to the contaminated sewage and water during the cleanup.

The prison officials knew during these cleanup incidents that the sewage water was contaminated with viruses from AIDS patients, HIV positive patients, and patients with other infectious diseases (II App. 26-28, 30-41). The inmates were not aware that the sewage came from the second floor of the hospital where at least one AIDS patient and patients with other communicable diseases were housed until July 7, 1987, when one of the inmates found a memo written on June 10, 1987, but never distributed, by one of the officials, Marilyn Butts, indicating that the sewage probably caused a substantial risk (App. 041, II App. 28-29).

Laboratory technician Steven Howard testified that he worked at the laboratory of the hospital for thirteen years and that there were HIV positive patients on the second, third, and fourth floors of the hospital. He also indicated that there were HIV positive patients in June of 1987 on the second floor of the hospital, as well as patients with other infectious diseases such as tuberculosis, hepatitis, and others (I Tr. 79-80).

Dr. David M. Tarlow testified as an expert at the trial, and was the only doctor who had interviewed the inmates, reviewed their

medical charts, prepared interview forms regarding their symptoms, and gave a medical opinion concerning their emotional state of mind and physical changes (Tr. 2-102). He also testified that hospital workers take quite extensive precautions when working with AIDS and hepatitis patients, such as wearing gowns, double gloves, boots, and masks, as is done with all high-risk patients (Tr. 2-85). He further testified that medical evidence supports that the AIDS virus can be transmitted through any body fluid, including semen, saliva, tears, feces, and urine (Tr. 2-86).

Prison official Marilyn Butts, also a defendant in the case, testified that she was Director of Nursing in June and July of 1987 at the prison hospital, and recalled that there was one HIV positive patient on the second floor of the hospital and other patients who were acute (Tr. 2-10). She also stated that the sewage problem was "potentially maybe a health risk to everyone that was there" (Tr. 2-27).

William J. Kaplan, who was policy coordinator at the JCCC, testified that as of the time of trial there were no policies or procedures specifically addressing procedures pertaining to the manner in which inmates and civilian personnel were to unstop sewer lines or clean up (Tr. 2-38). There were no guidelines or procedures as to how inmates were to protect themselves in a dangerous situation where health risks were involved (Tr. 39).

Only gloves and rubber boots were available for use by the inmates in 1987 when the exposure to the contaminated sewage occurred (Supp. Tr. 2-14, Tr. 3-6 to 3-8). Three years later, at the time of trial in 1990, the only equipment still available to inmates working in hazardous conditions consisted of 8 pairs of rubber boots, 4 face shields, a box of 100 surgical masks, and rubber gloves (unknown number) (Tr. 2-50). None of the items would protect from overhead sewage (Tr. 2-51).

There were as many as thirty (30) inmates who were involved in the sewage cleanup in June and July of 1987 (Tr. 2-7). Thus,

not only was the equipment provided by prison officials inadequate as of 1987, but even three (3) years later in 1990, at the time of trial, there was still not sufficient protective gear and no policies in place to provide for protection of inmates working in hazardous conditions.

At the end of plaintiffs' case, the district court directed verdicts in favor of defendants Armontrout, Moore, Lombardi, Wieburg, Gately, Hanauer, Borghart, Bauman, and Neal, as to damages only, and withheld ruling on injunctive relief until after the trial. Magistrate Knox did not enter a finding that there was no constitutional violation — only a ruling as to damages. Only the constitutional violations of defendants Bowers, Stout, Butts, and Haggart were before the jury and decided by the jury. During the trial, the court heard additional evidence outside the presence of the jury on the issue of injunctive relief only (Tr. 2-72 to 2-81). Herschell Larimore, a maintenance supervisor at JCCC, testified on the issue of injunctive relief related to the continued failure of the defendants to provide adequate protection and warnings subsequent to the original incidents which occurred in June and July of 1987. The verdict only related to defendants Bowers, Stout, Butts, and Haggart. Defendants Armontrout, Moore, Lombardi, Wieburg, Gately, Hanauer, Borghart, Bauman, and Neal, whose verdicts were directed, were the persons primarily responsible for maintaining protective clothing for inmate workers.

The court recognized that raw sewage presents potential health hazards and that adequate protective clothing and warnings are necessary to protect inmates, and ordered the appropriate, very minimal, injunctive relief against the prison officials. The court entered its injunctive relief, knowing it had jurisdiction to do so because in the original complaint of Michael Burton, et al., the plaintiffs requested in paragraphs 16 and 31 injunctive relief to prevent irreparable injuries of the past and in the future (II App. 8, App. 034-044). *See Freeman v. Pitts*, 112 S.Ct. 1430 (1992).

REASONS WHY THE WRIT SHOULD BE DENIED

The Eighth Circuit's holding that injunctive relief was permissible despite verdicts in favor of state officials is not contrary to decisions of this Court and not unprecedented expansion of federal court jurisdiction.

The Eighth Circuit's holding that injunctive relief was permissible despite verdicts in favor of state officials is based on a particular set of facts and circumstances wherein general verdicts were issued by the jury which did not specifically set forth whether a lack of a constitutional violation was found. Further, the directed verdicts were entered against the other defendants as to damages only. No finding of lack of constitutional violation was made. In addition, the judge heard additional evidence outside the presence of the jury on the issue of continuing and future harm to plaintiffs for the purpose of considering injunctive relief.

The facts and law of this case permit injunctive relief. The decision of the Eighth Circuit to grant injunctive relief on the particular set of facts in this case does not conflict with decisions of this Court, does not expand federal jurisdiction or unnecessarily interfere with state officials, and does not violate the Seventh Amendment.

I. Federal courts possess jurisdiction to grant injunctive relief absent a finding of constitutional liability.

As the Eighth Circuit's opinion in this case pointed out, courts have broad discretionary power to order injunctive relief. *Burton v. Armontrout*, 975 F.2d 543 (8th Cir. 1992) (citing *Taylor Bay Protective Ass'n v. Administrator, United States E.P.A.*, 884 F.2d 1073, 1079 (8th Cir. 1989). The grant or denial of injunctive relief lies within the discretion of the district court and such decision will be reversed only if the court relied on an erroneous legal premise or otherwise abused its discretion. *Chalk v. U.S.*

Dist. Court, 840 F.2d 701 (9th Cir. 1988). "In shaping equity decrees, the trial court is vested with broad discretionary power; appellate review is correspondingly narrow. Moreover, in constitutional adjudication as elsewhere, equitable remedies are a special blend of what is necessary, what is fair, and what is workable. In equity as nowhere else courts eschew rigid absolutes and look to the practical realities and necessities inescapably involved in reconciling competing interests, notwithstanding those interests may have constitutional roots." *Lemon v. Kurtzman*, 93 S.Ct. 1463, 1469 (1973). As the Eighth Circuit's opinion also indicated, courts may grant injunctive relief despite a jury's determination that defendants are not liable for damages. *Burton* at 545 (citing *Johnson v. Bowers*, 884 F.2d 1053, 1056 (8th Cir. 1989). A showing of specific money damage is not necessary to support an injunction. *Gilbrech v. Kloberdanz*, 107 N.W.2d 547 (1961).

In ordering injunctive relief, a court must do so in light of all the facts and circumstances in a case, *Keco Indus., Inc. v. Laird*, 318 F.Supp. 1361 (D.C.D.C. 1970) and a court exercises power and control over the entry of a judgment on a verdict to the extent of determining what is the appropriate judgment to be rendered in accordance with the jury's verdict. *Wilson v. Eberle*, 18 F.R.D. 7 (1955). A court may rely on evidence not presented to the jury when the jury's factual findings are incomplete or inconclusive. *Burton* at 545, citing *Charles Jacquin Et Cie, Inc. v. Destileria Serralles, Inc.*, 921 F.2d 467, 472 (3d Cir. 1990).

The main virtue of an injunction is to anticipate and prevent threatened wrongs, and a remedy which prevents a threatened wrong is better than one which provides for the payment of possible damages caused thereby. *Zimmerman v. Philjon, Inc.*, Pa., 368 A.2d 694 (1977). Courts should get involved in granting injunctive relief when the threat of a constitutional violation is both real and immediate. *Rogers v. Scurr*, 676 F.2d 1211 (1982). Accordingly, in a civil rights action, plaintiffs are entitled to a

permanent injunction where there exists some cognizable danger of recurrent violation. *Green v. Williams*, 541 F.Supp. 863 (E.D. Tenn. 1981). Also, in prison situations, when there exists a threat of future inhumane conditions of confinement, injunctive relief should be granted. *DeGidio v. Pung*, 704 F.Supp. 922 (D. Minn. 1989). Forcing inmates to work in a shower of human excrement without protective clothing and equipment would be "inconsistent with any standard of decency." *Fruit v. Norris*, 905 F.2d 1147 (8th Cir. 1990).

Further, the fact that no or few cases have granted the precise relief sought under similar circumstances is not a controlling reason for refusing the relief. Otherwise, courts would often find themselves powerless to grant adequate relief, solely because the precise question had never arisen. *First Nat. Exchange Bank v. Hughson*, 74 S.E.2d 797 (1953). Nor is the mere fact that a case is new or novel and is not brought plainly within the limits of some adjudged case enough to preclude equity from taking jurisdiction. *Texas & P.R. Co. v. Rigsby*, 241 U.S. 33 (1916).

In this case, the district court evaluated additional evidence which was not before the jury, bearing on the granting of injunctive relief to prevent future harm. The evidence demonstrated a continuing policy by prison officials of ignoring the rights of inmates and guards to be protected from potential health hazards. The JCCC officials continued in their failure to warn inmates and guards of the danger of working in raw sewage and to provide adequate protective clothing to protect them, despite the passage of three years and increased awareness of the dangers of AIDS.

The additional testimony was heard by the court outside the presence of the jury from Herschell Larimore, a maintenance supervisor at the JCCC (Tr. 1-72 to 2-81). Mr. Larimore testified that as of March, 1990, neither civilians nor inmates were warned prior to repairing the plumbing of AIDS positive inmates

that they were working in the raw sewage of inmates who were AIDS patients or that protective clothing was necessary. William Kaplan, policy coordinator at JCCC, also testified that he knew of no written policies in effect presently or in June and July of 1987 which set forth the protective measures and clothing necessary for inmates to utilize when working in raw sewage or other dangerous conditions. Further, testimony from Donald Bax, maintenance supervisor at JCCC, indicated that there were still no policies in place regarding warning inmates or civilians prior to working in sewers or toilets of AIDS inmates (Tr. 2-53, 54), and that inmates were receiving written violations from prison officials if they refused to work in the areas where AIDS inmates were housed, even if the inmates had open sores.

Many authoritative health and medical documents were introduced into evidence during the main case indicating the extreme health and safety hazards of exposure to the body fluids of HIV positive persons, including raw sewage (Ex. 39-46). The American Red Cross and U.S. Public Health Services exhibit stated: "Be careful to protect him or her from contact with body fluids which may carry the AIDS virus. Body fluids include blood, semen, urine, feces, saliva, and vaginal secretions" (Ex. 41). Another U.S. Public Health Services exhibit indicated: "The Public Health Service has outlined instructions for hospital workers who care for AIDS patients. The most important PHS recommendation is that people who care for AIDS patients avoid direct contact with their skin or mucous membranes, with blood and bloody fluids of patients with AIDS or AIDS-related disorders. Urine, feces, body secretions, and open wounds are likely to contain blood that harbors the AIDS virus. Wear gloves when handling blood specimens, blood soiled items, body fluids, excretions and secretions, as well as surfaces, materials, and objects contaminated with these fluids. Wear coverall gown when clothing may be exposed to body fluids, blood secretions or excretions (Ex. 44). Testimony was received from Eddie Headrick, who testified as an expert for the petitioners, admitting

that these exhibits were acceptable and authoritative (Tr. 3-17, 3-20). An exhibit from the U.S. Department of Health and Human Services, Public Service, Center of Disease Control stated that "The time between an infection with the HGLV-3 virus and the onset of symptoms seems to range from about six months to five years or more.:. Symptoms of illness appear in approximately 30 percent of the individuals within five years of infection (Ex. 42, p.2).

Further, respondents provided evidence as part of their proposed findings of fact and conclusions of law showing that as of October, 1990, the Missouri State Penitentiary had new procedures for disposal of hazardous waste, but still provided no guidelines for the protection of the workers handling said waste (App. 181-186). Also, Occupational Safety and Health Administration instructions for handling body fluids of HIV positive and hepatitis B patients were in existence and available to prison officials to implement, but they had not done so (Attachment to proposed findings, App. 187-211).

Clearly, there is sufficient evidence from the medical community to indicate the potential life-threatening risks of exposure to raw sewage, and particularly the raw sewage of AIDS patients. And, clearly, there is evidence pointing to the continuing lack of response by the prison officials to the health hazards posed to inmates from working in such hazardous conditions. The district court and court of appeals in this case realized these facts and granted the appropriate injunctive relief to guard against such blatantly lax attitudes on the part of the prison officials to protect inmates from such life-threatening risks. The additional evidence heard and factual findings ascertained by the district court on the issue of injunctive relief properly supplemented the jury's general verdict, and the court of appeals properly affirmed the injunctive relief, keeping in mind that "equitable remedies are a special blend of what is necessary, what is fair, and what is workable." *Burton* at 545, quoting *Lemon v. Kurtzman*, 411 U.S. 192, 200 (1973).

II. The injunction granted does not unnecessarily interfere with state officials

The Supreme Court has asked for abstention of interference with administration of correctional institutions by the courts only when the practice does not offend a fundamental constitutional guarantee; otherwise, the courts must discharge their duty to protect constitutional rights. *Procunier v. Martinez*, 94 S.Ct. 1800 (1974). Although courts may not impose their own views of enlightened correctional policy on state correctional authorities, the deference accorded to correctional staffs is not absolute and inmates may not be confined in unsafe conditions. *Baker v. Holden*, 787 F.Supp. 1008 (D. Utah 1992), *Estelle v. Gamble*, 429 U.S. 97 (1976). While federal courts continue to recognize broad discretion required for state prison officials to maintain orderly and secure institutions, jails are constitutionally obligated to provide reasonably adequate sanitation for their inmates. *Fambro v. Fulton County, Ga.*, 713 F.Supp. 1426 (N.D. Ga. 1989). Courts must avoid becoming enmeshed in the minutiae of prison operations unless objective assessment of the prison conditions compels conclusion that inmates are being subjected to unreasonable safety risks. *Coniglio v. Thomas*, 657 F.Supp. 409 (S.D. NY 1987). A court's deference to administrative expertise and discretionary authority of correctional officials must be schooled, not absolute. *Williams v. Lane*, 851 F.2d 867 (7th Cir. 1988), *cert. denied*, 488 U.S. 1047.

Further, minimally intrusive relief against prison practices may assume the form of an order enjoining the continuation of practices, policies, or conditions adjudged constitutionally infirm. *Kendrick v. Bland*, 740 F.2d 432 (6th Cir. 1984). Simply because the constitution does not require a State Department of Corrections to provide inmates with certain items does not mean that it is inappropriate for a district court to order them in the course of fashioning a remedy. *Gluth v. Kangas*, 951 F.2d 1504 (9th Cir. 1991). In determining the constitutional validity of a

prison regulation or policy, the Court of Appeals focuses its inquiry on the legitimacy of the policy as a whole. *Blankenship v. Gunter*, 898 F.2d 625 (8th Cir. 1990). The United States, via the Bureau of Prisons, must exercise ordinary diligence in keeping prisoners safe and free from harm. *Artis v. Petrovsky*, 638 F.Supp. 51 (W.D. Mo. 1986). Additionally, courts must take into consideration the cost of compliance with an injunction when ordering relief. *Toussaint v. McCarthy*, 597 F.Supp. 1388, 1419 (N.D. Cal. 1984) (citing *Hoptowit v. Ray*, 682 F.2d 1237, 1247 (9th Cir. 1982) and *Wright v. Rushen*, 642 F.2d 1129, 1134 (9th Cir. 1981).

Here, the district court and court of appeals concluded that even though common sense suggests a person should have knowledge that unprotected contact with human waste can cause disease, the JCCC officials responsible for conditions at the prison took no steps to provide adequate protective clothing or warnings to inmates. The injunction ordered could not be any less intrusive or costly on the prison officials. The term "sufficient numbers" (of rubber boots, rubber gloves, leather gloves, surgical masks, and face shields ordered by the injunction) is not indefinite or difficult to understand, as the petitioners assert. Clearly, "sufficient numbers" requires that the officials keep on hand enough of the designated protective gear for as many numbers of prisoners they request to work in raw sewage. As the petitioners indicate, the prison officials already possessed much of the protective gear; they merely were required to add items in sufficient quantities to insure the reasonable protection of their inmates by making sure each inmate required to work in raw sewage had warning of the risks involved and protective items to wear.

Additionally, considering the magnitude of the potential health hazards and life-threatening risks inherent in working in raw sewage, the permanent warning regarding the necessity of wearing protective clothing while working in raw sewage required to

be posted by the injunction is certainly not unreasonable, costly, or intrusive. The petitioners indicate that the injunction interferes with state officials and forever subjects state officials, and their successors, to "unnecessary risks" of being held in contempt if they should fail to comply with the mandatory injunction. Surely, requiring inmates to work in raw sewage unprotected and without warning of potential hazards presents more "unnecessary risks" and outweighs the concerns of prison officials of being held in contempt.

The district court and court of appeals realized that this injunction was necessary to prevent extreme health risks and possible death to inmates, and that such a measure was called for because the prison officials had not taken it upon themselves to adopt the needed, basic policies to protect their prisoners. The injunctive relief was not intrusive in terms of its requirements or costs and did not place substantive restrictions on the exercise of discretion by prison officials.

III. The injunctive relief granted does not violate the prison officials' Seventh Amendment rights.

In ordering injunctive relief, a court may rely on evidence not presented to the jury when the jury's factual findings are incomplete or inconclusive. *Burton*, *supra* at 545 (citing *Charles Jacquin Et Cie, Inc. v. Destileria Serralles, Inc.*, *supra* at 472. In matters tried in a federal district court without a jury, the judge is the trier of the facts and occupies a dual position in that he performs the function of the court in determining the applicable law and the function of a jury in determining the ultimate pertinent facts. *Anthony v. Louisiana & A. Ry. Co.*, 316 F.2d 858 (8th Cir. 1963), *cert. denied*, 375 U.S. 830. The court occupies the same relation to the facts in the case that a jury would have if the issue had been tried by the jury. *Dierks Lumber & Coal Co. v. Barnett*, 221 F.2d 695 (8th Cir. 1955).

The trial judge is the judge of the credibility of the witnesses, *Carlisle v. M/S Sistina*, 407 F.2d 824 (5th Cir. 1969), and the weight of the evidence. *Anthony v. Louisiana & A. Ry. Co., supra*. He may draw necessary and obvious inferences from the evidence just as jurors may in a trial before a jury. *Saturn Oil & Gas Co. v. Northern Natural Gas Co.*, 359 F. 2d 297 (8th Cir. 1966). Where the evidence is conflicting or is such that reasonable persons may honestly draw different inferences, it is for the court, as the trier of facts, to determine what inferences shall be drawn. *Loc-Wood Boat & Motors, Inc. v. Rockwell*, 245 F.2d 306 (8th Cir. 1957).

In this case, as the Eighth Circuit opinion points out, the jury's findings were inconclusive because the general verdict directive did not allow the jury to make specific factual findings upon which the district court could rely when granting or denying the injunction. As indicated previously, additional testimony regarding injunctive relief was heard during a separate non-jury hearing. Also, as indicated previously, Herschell Larimore, a maintenance supervisor at the JCCC, was one of those who testified outside the presence of the jury on the issue of injunctive relief. It was the petitioners who requested that Mr. Larimore testify only before the court and not before the jury for the purposes of determining injunctive relief. Thus, they can not now contend that their Seventh Amendment right to have a jury decide all issues common to both legal and equitable claims was violated.

As a result of the additional evidence heard and factual findings ascertained at the hearing regarding injunctive relief, the district court properly supplied its own factual findings on injunctive relief to supplement the jury's general verdict in this case. It is not a "fatal flaw in the reasoning of the Eighth Circuit" that a nominal damage instruction was submitted to the jury, as the petitioners contend. Because of the lack of specificity of the general verdict, as the court of appeals noted, the jury could have

found no damages, actual or nominal, and still believed the petitioners were recklessly indifferent to the health needs of the inmates. The return of the general verdict prevented the court from ascertaining the jury's specific factual findings, and, therefore, it was appropriate for the court to supply its own factual findings to supplement the jury's verdict.

In their petition at page 16, the petitioners argue that pursuant to *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962) and *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959) "where a case involves a jury deciding legal claims and a court determining equitable ones, any factual issues central to both claims must be tried to the jury first so that the parties' Seventh Amendment jury trial rights are not foreclosed on common factual issues." This argument must fail because the petitioners waived the right to have all common factual issues heard by the jury when they waived that right during trial and allowed the judge to hear additional evidence as to injunctive relief only outside the presence of the jury.

In addition to the above argument and not waiving that position, no Seventh Amendment argument can be raised with respect to the maintenance supervisors and JCCC officials who were the subject of the directed verdict in their favor prior to the jury's verdict. The jury did not decide whether or not these defendants committed a constitutional violation, and neither did the judge. The judge directed the verdict specifically as to damages only. This allowed the judge to enter injunctive relief as to these defendants subsequent to the jury trial on the basis of the risk of future harm and based on the evidence heard outside the presence of the jury. It is obvious from the court's order of October 30, 1990 (attached to the Petition at A-17) that it was always the intent of the court to consider injunctive relief despite its directed verdict.

The petitioners admit in their petition that the defendants who were directed out of the case, and their successors, are "the

primary target of the mandatory, permanent injunction even though the claims were not submitted to the jury" (Petition, p. 20). This negates the entire argument that the judge entered an order in conflict with the jury's verdict and in violation of the Seventh Amendment because the jury did not decide the merits of the causes of action against defendants Armontrout, Moore, Lombardi, Wieburg, Gately, Hanauer, Borghart, Bauman, and Neal, who are the primary targets of the injunction. Thus, there exists no violation of the Seventh Amendment in this case.

CONCLUSION

The petitioners have not alleged or presented supportable arguments for any issues that would make this case one that should be accepted by this Court for review because the decision is not in conflict with other circuits or this Court, and does not present an important question of federal law which should be settled by this Court. For this reason and the foregoing reasons, the petition for writ of certiorari should not be granted.

Respectfully submitted,

JEANENE MOENCKMEIER

Attorney for Respondents